2013 (1) ECS (26 ) (Guj-HC)

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

**Commissioner of Central Excise Ahmedabad – II**

**Versus**

**Inductotherm (I) Pvt. Ltd.**

**TAX APPEAL NO. 1744 OF 2007**

Commissioner of Central Excise Ahmedabad – II Appellants

Versus

Inductotherm (I) Pvt. Ltd. Opponents

**CORAM**

**Hon'ble Mr. Justice Akil Kureshi**
**And**
**Hon'ble Ms. Justice Harsha Devani**

Dated 28.6.2012

**"From the above statutory provisions, it can be seen that whenever any duty has been collected in excess of excise duty payable or in any manner as representing duty of excise, such person has to pay the same to the Central Government forthwith." [Para 19]**

**"Secondly, utilization of the cenvat credit for the purpose of payment of unauthorizedly collected so called excise duty was not permissible under the Rules. The Contention of the Department that by doing so, the respondent passed on cenvat credit to the purchaser to be availed by them ultimately which credit such purchasers were not entitled to cannot be brushed aside." [Para 20]**

**Per : Honourable Mr. Justice Akil Kureshi**

1. This appeal is filed by the Revenue calling in question legality and validity of the judgment and order dated 14.5.2007 passed by the Customs, Excise and service Tax Appellate Tribunal (CESTAT), Ahmedabad in Appeal No. E/3373/07. While admitting the appeal on 1.2.2008, this court framed the following substantial questions of law:

> "a. Whether, in the facts and in the circumstances of the case, the tribunal is justified in holding that provision of Section 11D are not applicable in the instant case?
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> b. Whether, in the facts and in the circumstances of the case, the tribunal is justified in holding that the amount deposited by the respondent by making a debit entry as Cenvat Credit account amounts to payment of duty as required under Section 11D of the Central Excise Act, 1994"

2. Facts in brief may be noted. Respondent is a manufacturer of induction furnace and other engineering goods. They export such products and also sell them in domestic market. The respondent – manufacturer regularly pays excised duties and other duties under the central Excise Act, 1994 and the Rules made thereunder. Against the export of goods, the respondent is entitled to certain duty waivers. The Central Excise Authorities noticed that for a period of about two and a half years between March 2003 and December 2005, the respondent had made substantial exports. It should therefore have excess Cenvat credit lying unutilized in cenvat account. Closer scrutiny, however, revealed that such credits were not available. Further investigation was carried out and it was found that the respondent was clearing certain parts of induction furnaces without any manufacturing activity referred to in the technical term 'as such' basis at a higher value. The Department noticed that the respondent was encashing unutilized cenvat credit lying in RG 23 A Pt. II by raising valued of the goods to be cleared as such and collecting the same from the buyers of such goods. According to the Department, as per the provisions of the cenvat credit Rules, the respondent was required to debit the amount equal to the credit availed while receiving such goods as inputs when cleared on as such basis. It was noticed that the respondent was collecting higher amounts towards duty from the purchasers and depositing the same with the Department in form of adjustment of Cenvat credit. The department was of the opinion that the entire transaction irregular, was in breach of the Cenvat Credit Rules, as applicable from time to time. As per section 11D of the central Excise Act, therefore, the respondent was liable to refund such amount.

3. A show cause notice came to be issued by the Commissioner of Central Excise, Ahmedabad. In such notice, it was alleged that the respondent was clearing certain parts

of Induction Furnace on "as such" basis at a higher value and passing on unutilized cenvat credit by raising the value of inputs and collection the same from the buyer of such goods. It was alleged that for the period between 1.3.2003 and 31.12.2005, the respondent assessee had collected total amount of Rs. 3,28,37,692/- towards such duty from the purchasers of the goods as such. The respondent had against such clearance of goods taken Cenvat credit to the tune of Rs. 1,59,33,421/-. It was, therefore, alleged that the differential amount between the duty collected and the cenvat credit taken on such goods of Rs. 1,69,04,271/- was not allowable for inputs cleared as such.

In the show cause, it was further stated that statement of Shri Hardik H. Medh, Financial controller and Company Secretary of the respondent was recorded on 8.2.2006 in which he had stated that the respondent was availing Cenvat credit from the beginning and was paying duty on the transaction value at the time of removal of goods. On the basis of such facts, it was alleged in the show cause notice that the respondent was fully aware of the provisions made in Cenvat Credit Rules, but knowingly and deliberately cleared the input as such on transaction value at higher rate ignoring the rules facilitating the buyer to avail more cenvat credit and to encash the untilized credit lying in balance. In the notice, it was further alleged that the respondent assessee had cleared the goods as such and collected the amount representing as central excise duty from the buyers of the goods. In terms of section 11 D (1) of the Act, the respondent has to forthwith pay such amount to the Central Government. Notice, therefore, called upon the respondent why :

i. The amounting to Rs. 1,69,04,271/- (Rupees one crore sixty nine lakhs four thousand two hundred seventy one only) should not be recovered under section 11 D (2) of the central Excise Act, 1994 as discussed above;

ii. Why interest should not be recovered from them under section 11 DD of Central Excise Act, 1994 in respect of excess amount recovered as shown para 1 above; and

iii. Why the penalty should not be imposed upon them under Rule 13 of Cenvat Credit Rules, 2002/Rule of the Cenvat Credit Rules, 2004."

4. A similar notice for a different period for alleged infraction between 1.1. 2006 and 30th June 2006 also came to be issued on 23.11.2006. In such notice also, the respondent was called upon the show cause why an amount of Rs. 36,29,660/- should not be recovered under section 11 D (2) of the Central Excise Act with interest and penalty. Since in all

material aspects, the allegations in the subsequent notice are similar to those made in the earlier notice, it is not necessary to record in any detail the contents thereof.

5. The respondent appears before the Commissioner and filed detailed replies to the show cause notices. It was contended that the respondent had not committed breach of any of the rules. The amount of duty collected was already deposited with the Government. Section 11 D (1) therefore would not apply. There was, therefore, no question of recovery of any amount under section 11 D (2) of the Central Excise Act. It was also contended that the proceedings are barred by limitation. The respondent relied on certain decisions of this court as well as the Apex court to contend that such proceedings for recovery of duties should not be raised after a reasonable period of time.

6. The commissioner, however, was not convinced. He, by his order dated 27.2.2007, confirmed the duty demand raised in both the notices. With respect to penalty, he found that the goods were removed in contravention of the rules with ulterior motive. Maximum penalty that could be imposed was Rs. 10,000/- per transaction. Since there were large number of transaction, he imposed consolidated penalty of Rs. 5 lacs covering both the show cause notices. He also ordered recovery of total sum of Rs. 2,05,33,931/- covering both the show cause notices with interest at appropriate rate under section 11 DD of the Central Excise Act, 1994.

7. The respondent assessee challenged the order of the Commissioner before the Tribunal. The Tribunal by the impugned order dated 14.5.2007 allowed the assessee's appeal. Before the Tribunal, counsel for the assessee urged that the assessee was supplying spare parts to the purchasers on higher price and also paying duty on higher price and hence section 11 D of the Central Excise Act did not apply.

8. The Tribunal in its brief order accepted the contention of the assessee. The Tribunal found that undisputedly, the assessee had availed credit on the input procured by them for the purpose of manufacturing of induction furnace. The assessee had exported the finished goods manufactured by them under bond and also cleared the finished goods for home consumption on payment of appropriate duty. The Tribunal was of the opinion that the Department's demand of duty was totally misconstrued and misconceived. If the assessee supplied spare parts on higher value to the purchasers and collected excise duty payable and debited the same from cenvat credit account, the Revenue cannot have any

quarrel against the same. The Tribunal was of the opinion that section 11 D of the Central Excise Act did not apply. The Tribunal concluded as under :

> "On the plain reading of the above reproduced section, it can be seen that this section can be brought into play to demand that duty only when the assessee has collected excess amount in the guise of excise duty from his purchasers and has not deposited the same with the Government of India. In the present case the issue is not so. It is on record and undisputed that the amount of the duty as indicated on the invoices, during the relevant period, has been deposited by the appellant by making a debit made in cenvat credit account. It is a settled law that debits made in Cenvat credit accounts is discharged of the duty liability by the assessee. Since the provisions of Section 11 D are not at all applicable in the present case, we find that the impugned order is liable to be set aside and we do so."

It is this decision of the Tribunal which the Revenue has challenged in the present Tax appeal.

9. Learned counsel Shri Ravani for the appellant taking us through the material on record and the statutory provisions applicable contended that the respondent had cleared the goods on as such basis without any manufacturing activity having been undertaken. On such clearance, the respondent had to follow the procedure laid down in the Cenvat Credit Rules applicable from time to time. The respondent not having done so had breached the rules. Counsel further submitted that the respondent had inflated the price of such goods and collected duty in the guise of excise which did not apply. Instead of depositing such amount with the Central Government, the assessee availed the Cenvat credit lying unutilized in its account.

9.1 Counsel submitted that such modality was noticed upon investigation, initially finding that though the respondent was engaged in exporting goods, very little credits in the Cenvat account were lying. It was found that such excess Cenvat credit was being utilized for payment of "duty" collected from the purchasers of goods on as such basis on inflated price. Counsel submitted that such modality would permit the purchasers of such goods to claim higher Cenvat credit which was not available and on the other hand, permit the respondent to encash its unutilized Cenvat Credit in the account.

10. On the other hand, learned counsel Shri Faresh Dave for the respondent assessee strongly opposed the appeal contending that the Tribunal has come to the correct conclusion. The respondent may have charged higher price for the goods sold any may have charged duty though it did not apply, but the duty collected was immediately deposited with the Central Government. Section 11 D of the Central Excise Act therefore would not apply. He further submitted that in the show cause notice, the Department did not put up the case that no Cenvat credit was available in the account of the assessee. The credit taken by the respondent for payment of duty was never reversed. He further submitted that the assessee could have claimed refund of unutilized credit even otherwise. With respect to the penalty, counsel submitted that there were no allegations in the show cause notice or findings in the order in original of any breach of the rules with malafide intention. He, therefore, submitted that the penalty be dropped.

10.1 counsel relied on following decisions in support of his contentions :

(i) In the case of Eicher Motors Ltd. vs. Union of India, 1999 (106) E.L.T. 3 (SC) wherein the Apex Court held that the provision for facility of credit in the modvat scheme is as good as tax paid.

(ii) In the case of Collector of Central Excise, Pune vs. Dai Ichi Karkaria Ltd, 1999 (112) E.L.T 353 (SC), the Apex Court observed that in terms of the Rules, when a manufacturer obtains credit for the excise duty paid on raw material to be used by him in production of excisable product, making a declaration and obtaining acknowledgment thereof, such manufacturer is entitled to use the credit at any time thereafter when making payment of excise duty on excisable product. It was observed that there is no provision in the Rules which provides for reversal of the credit by the excise authorities except where it has been illegally or irregularly taken.

(iii) In the case of Shankeshwar Fabrics Private Ltd. vs. Union of India, 2002 (142) E.L.T 42 (Raj.), a Division Bench of the Rajasthan High court held that once the capital goods which have been already utilized and credit has been received against their utilization, the provisions in the notification cannot be given retrospective effect so as to nullify the Modvat credit which has already been earned by the individual.

In short, the attempt on the part of the counsel was to contend that payment made through surrender of cenvat credit is as good as actual payment.

11. Having thus heard the learned counsel for the parties and having perused the documents on record, we may notice that the entire notice period spanned between two show cause notices starting with 1.3.2003 and ending with 30th June 2006 would fall between two different sets of Cenvat Credit Rules. Namely, Cenvat Credit Rules 2002 (for short 'Rules 2002') which were later on substituted by Cenvat Credit Rules 2004 (for short 'Rules 2004'). Barring some minor changes here and there, in all material aspects, these rules were similar. Therefore, except for changes which are material, we may examine the rule position emerging in the Rules 2004.

12. In the Rules 2002, sub-ruled (4) of rule 3 provided as under :

> "(4) When inputs or capital goods, on which cenvat credit has been taken, are removed as such from the factory, the manufacturer of the final products shall pay an amount equal to the duty of excise which is leviable on such goods at the rate applicable to such goods on the date of such removal and on the value determined for such goods under section 4 or section 4 A of the Act, as the case may be, and such removal shall be made under the cover of an invoice referred to in rule 7."

This rule was amended with effect from 1.3.2003. In the amended from, rule 3 (4) of 2002 reads as under:

> "(4) When inputs or capital goods, on which cenvat credit has been taken, are removed as such from the factory, the manufacturer of the final products shall pay an amount equal to the credit availed in respect of such inputs or capital goods and such removal shall be made under the cover of an invoice referred to in rule 7."

From the above statutory provisions, it can be seen that prior to 1.3.2003 when the new ruled 3 (4) came into operation, when inputs or capital goods on which cenvat credit has been taken are removed as such from the factory, manufacturer of the final product had to pay an amount equal to the duty of excise which is leviable on such goods at the rate applicable to the same on the date of removal and on the value determined for such goods under section 4 or 4 A of the Central Excise Act. In short, prior to 1.3.2003, the computation of central excise on the goods removed on as such basis was on transaction value. On 1.3.2003, significant changed was made inasmuch as on removal of goods as such from the factory, the manufacturer of final product had to pay amount equal to the credit availed in respect of such inputs or capital goods and such removal had to be made under the cover of an invoice referred to in rule 7. We may at this stage record that such provision is found in later Rule 2004 in rule 3 (5) thereof.

13. With this brief recording of Legislative change, we advert to the Rules 2004 applicable to the present case. Rule 3 of the Rules 2004 pertains to Cenvat credit. Sub-rule (2) thereof provides that a manufacturer or producer of final products or a provider of a taxable service shall be allowed to take credit to be referred as Cenvat Credit of several duties mentioned in clauses (i) to (xi) of sub – rule (1) paid on any input or capital goods received in the factory of manufacture of final product or premises of the provider of output service and any input service received by the manufacturer of final produce or by the provider of output services. Sub – rule (4) of rule 3 provides the purposes for which the Cenvat Credit may be utilized and the relevant portion of which reads as under:

> "(4). The CENVAT credit may bed utilized for payment of –
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> (a). any duty of excise on any final product, or
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> (b). an amount equal to the CENVAT credit taken on inputs if such inputs are moved as such or after being partially processed; or
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> (c). an amount equal to the CENVAT credit taken on capital goods if such capital goods are moved as such; or
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> (d). an amount under sub –rule (2) of rule 16 of Central Excise, Rules, 2002; or
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> (e). service tax on any output service.
> ……."

Relevant portion of Sub-rule (5) of rule 3 of the Rules 2004 which is similar to the amended ruled 3 (4) of Rules 2002 reads as under:

> "(5). When inputs or capital goods, on which CENVAT credit has been taken, are removed as such from the factory, or premises of the provider of output service, the manufacturer of the final products or provider of output service, as the case may be, shall pay an amount equal to the credit availed in respect of such inputs or capital goods and such removal shall be made under the cover of an invoice referred to in rule 9.
> ……."

Sub-rule (6) of rule 3 provides that the amount paid under sub – rule (5) and sub – rule (5 A) shall be eligible as Cenvat Credit as if it was a duty paid by the person who removed such goods under such sub-rules.

13.1 Rule 4 of the Rules 2004 pertains to conditions for allowing cenvat credit. Rule 5 pertains to refund of cenvat credit and provides, inter alia, that where any input or input service is used in the manufacture of final products which is cleared for export under bond or letter of undertaking, as the case may be or used in the intermediate product cleared for export, or used in providing output service which is exported, the Cenvat credit in respect of the input or input service so used shall be allowed to be utilized by the manufacturer or provider of output service towards payment of duty of excise on any final product cleared for home consumption or for export on payment of duty or service tax on output service and where for any reason such adjustment is not possible, the manufacturer or the provider of output serviced shall be allowed refund of such amount subject to such safeguards, conditions and limitations, as may be specified by the Central Government by notification.

13.2 Rule 15 of the Rules 2004 provides for confiscation of penalty and prescribes different penalties for different breach of the Rules.

13.3 Section 11 D of the Central Excise Act pertains to duties of excise collected from the buyer to be deposited with the Central Government and reads as under:

> "11 D. Duties of excise collected from the buyers to be deposited with the Central Government. (1). Notwithstanding anything to the contrary contained in any order or direction of the Appellate Tribunal or any court or in any other provision of this Act or the rules made thereunder, every person who is liable to pay duty under this Act or the rules thereunder, and has collected any amount in excess of the duty assessed or determined and paid on any excisable goods under this Act or the rules made thereunder from the buyer of such goods in any manner as representing duty of excise, shall forthwith pay the amount so collected to the credit of the Central Government.
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> (1A) Every person, who has collected any amount in excess of the duty assessed or determined and paid on any excisable goods or has collected any amount as representing duty of excise on any excisable goods which are wholly exempt or are chargeable to nil rate of duty from any person in any manner, shall forthwith pay the amount so collected to the credit of the Central Government.
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> (2) Where any amount is required to be paid to the credit of the Central Government under sub-section (1) or sub-section (1 A), as the case may

be, and which has snot been so paid, the Central Excise officer may service, on the person liable to pay such amount, a notice requiring him to show cause why the said amount as specified in the notice, should not be paid by him to the credit of the Central Government.

(3) The Central Excise officer shall, after considering the representation, if any, made by the person on whom the notice is served under sub-section (2), determine the amount due from such person (not being in excess of the amount specified in the notice) and thereupon such person shall pay the amount so determined.

(4) The amount paid to the credit of the Central Government under sub – section (1) or sub – section (1A) or sub- section (3), as the case may be, shall be adjusted against the duty of excise payable by the person on finalization of assessment or any other proceeding for determination of duty of excise relating to the excisable goods referred to in sub – section (1) and sub – section (1 A).

(5) Where any surplus is left after the adjustment under sub – section (4), the amount of such surplus shall either be credited to the Fund or, as the case may be, refunded to the person who has borne the incidence of such amount, in accordance with the provisions of section 11 B and such person may make an application under that section in such cases within six months from the date of the public notice to be issued by the Assistant Commissioner of Central Excise for the refund of such surplus amount."

These in nut shell are the statutory provisions coming into play in the present case.

14. Bearing in mind the above statutory provisions, if we revert to the facts to the case, the case of the Department is that the respondent – assessee cleared certain goods without undertaking any manufacturing activity. Such clearance was mad at an inflated price. Certain charge was collected from the purchaser on the basic price in the guise of excise duty. The respondent though surrendered the entire amount so collected to the Department in the form of debiting the credit in the Cenvat account, according to the Department, this was in breach of rule 3 (4) of the Rules 2002 and thereafter rule 3 (5) of the Rules 2004. Since there was no manufacturing activity, no question of collection of excise duty would arise and therefore, the entire amount so collected had to be deposited in terms of section 11 D of the Act.

15. To our mind, there is considerable force in such contention. It is not in dispute that the respondent cleared the goods as such. Since no manufacturing activity was undertaken, question of collection of excise did not arise. While clearing the goods after 1.3.2003, the

respondent had to follow the procedure laid down in the amended rule 3 (4) of Rules 2002 and thereafter rule 3 (5) of the Rules of 2004. Such rules required that on clearance of goods on as such basis, the assessee should have paid an amount equal to the credit availed in respect of such inputs and that such removal should have been made under the cover of an invoice referred to in rule 9. To the extent the respondent court, at best may suggest that the payment made through Cenvat Credit is as good as actual payment, however, such payment should be for the purpose for which it is authorized under the Rules. In the case of Dai Ichi Karkaria Ltd. (supra) relied on by the respondent, the Apex Court observed as under :

> "17. It is clear from these Rules, as we read them, that manufacturer obtains credit for the excise duty paid on raw material to be used by him in the production of an excisable product immediately it makes the requisite declaration and obtaines an acknowledgment thereof. It is entitled to use the credit at any time thereafter when making payment of excise duty on the excisable product. There s no provision in the Rules which provides for a reversal of the credit by the excise authorities except where it has been illegally or irregularly taken, in which event it stands cancelled or, if utilized, has to be paid for. We are here really concerned with credit that has been validly taken, and its benefit is available to the manufacturer without any limitation in time or otherwise unless the manufacturer itself chooses not to use the raw material in its excisable product. The credit is, therefore, indefeasible. It should also be noted that there is no co-relation of the raw material and the final product; that is to say, it is not as if credit can be taken only on a final product that is manufactured out of the particular raw material to which the credit is related. The credit may be taken against the excise duty on a final product manufactured on the very day that it becomes available."

18 With this background, we if peruse section 11 D of the Central Excise Act, 1994, it emerges that under sub – section (1) thereof, every person who is liable to pay duty under the Act or the Rules made thereunder and has collected any amount in excess of the duty assessed or determined and paid on any excisable goods from the buyers of such goods, in any manner as representing duty of excise shall forthwith pay the amount so collected to the credit of the Central Government. Sub – Section (2) of section 11 D provides, inter aila, that if such amount is not credited, the Central Excise officer may issue a notice requiring such person to show cause why the same should not be paid by him to the Central Government. Sub – section (3) of section 11 D authorizes the Central Excise officer to determine the amount so payable and thereupon such person shall pay the same.

19 From the above statutory provisions, it can be seen that whenever any duty has been collected in excess of excise duty payable or in any manner as representing duty of excise, such person has to pay the same to the Central Government forthwith. In the present case, the respondent had collected certain amount from the purchasers representing the same as excise duty. Undisputedly, such amount could not have been collected as excise duty. The same, therefore, had to be forthwith paid to the Central Government in terms of section 11 D of the Act. The same not having been done, the Department was within its right to seek recovery thereof.

20 The view of the Tribunal that in any case the respondent could have encashed the utilized credit in the Cenvat account and that therefore the same did not make any difference to the Department, in our view, suffers from fallacy. Firstly, as noted, rule 5 of the Rules 2004 permitted refund of cenvat credit under certain circumstances which provides that such refund shall be allowed subject to such safeguards. Conditions and limitations as may be specified by the Central Government by notification. It can, thus, be seen that grant of refund is neither automatic not a matter of course. Nothing has been brought on record to suggest that the respondent was entitled to such refund as a matter of right. Secondly, utilization of the cenvat credit for the purpose of payment of unauthorizedly collected so called excise duty was not permissible under the Rules. The Contention of the Department that by doing so, the respondent passed on cenvat credit to the purchaser to be availed by them ultimately which credit such purchasers were not entitled to cannot be brushed aside.

21 We may record that before the Commissioner, the respondent had raised the contention as regards limitation. However, before us, no such contention has been raised. In any case, admittedly section 11 D of the Central Excise Act does not provide any rigid time limit. In such cases, as so long as the recovery proceedings are initiated within reasonable time, the same cannot be struck down only as time barred. What would be the reasonable period of time is essentially a question of fact to be judged on the basis of each individual case. In the present case, nothing has been pointed out to suggest that despite full knowledge of the modus employed by the respondent, the Department for a long period of time raised no demand.

22 With respect to penalty also, we are of the opinion that the Commissioner noted that there were large number of transactions during the period in question. We also notice that for breach of the rules in question, maximum penalty of Rs. 10,000/- per transaction was imposable. Considering the large number of transactions, the Commissioner imposed consolidated penalty of Rs. 5 lacs which also is not required to be touched.

23 Counsel for the respondent did make a faint attempt to suggest that breach of the procedure laid down in the amended rule 3 (4) of the Rules 2002 and of rule 3 (5) of Rules 2004 was on account of the previous procedure which permitted collection of duty on transaction basis, and such changes may not have been immediately noticed by the respondent. However, he conceded that even after such show cause notice having been issued by the Department and before the Tribunal allowed the assessee's appeal, respondent went on clearing goods following the same modus. Such contention, therefore, in absence of any convincing material on record, cannot be accepted.

24 In the result, the appeal is allowed. The judgment of the Tribunal is reversed and resultantly, the order of the Commissioner is restored. The questions are answered in negative, i.e. in fovour of the Department and against the assessee.